IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.T.SANKARAN

FRIDAY, THE 12TH JANUARY 2007 / 22ND PAUSHA 1928

MFA.No. 24 of 1998(A)

OPMV.14/1995 of MOTOR ACCIDENTS CLAIMS TRIBUNAL, MUVATTUPUZHA

APPELLANT: 3RD RESPONDENT:

THE ORIENTAL INSURANCE CO. LTD., KOTTAYAM,
NOW REPRESENTED BY ITS ADMINISTRATIVE OFFICER,
MOTOR THIRD PARTY CLAIMS CELL,
M.G.ROAD, KOCHI – 35.

BY ADV. SRI.MATHEWS JACOB (SR.)

RESPONDENTS: 2ND PETITIONER AND RESPONDENTS 1 & 2:

1. K.M.LEELAMMA, W/O.NARAYANAN NAIR,
   PUTHUSERIKUDIYIL HOUSE, ERAMALLOOR,
   KOTHAMANGALAM.

2. ROY, S/O.KURIAKOSE, PULIYELIL HOUSE,
   ELAMBRA, ERAMALLOOR, KOTHAMANGALAM.

3. GLADSON JACOB, KARUCHIRA VADAKKATHIL,
   PUTHENPURA HOUSE, VAKATHANAM, KOTTAYAM.

R3 BY ADV. SRI.P.RAVINDRAN
R2 BY ADV.SMT.PRIYA. H.
R1 BY ADV. SRI.P.V.ELIAS

THIS MISC. FIRST APPEAL HAVING BEEN FINALLY HEARD ON 12/1/2007. THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.T. SANKARAN, J.

M.F.A.NO. 24 OF 1998

Dated this the 12th day of January,2007

JUDGMENT

The third respondent – insurer- in O.P.(MV) No.14 of 1995, on the file of the Motor Accidents Claims Tribunal, Muvattupuzha, is the appellant. The accident took place on 30.1.1990. Ajay Gosh, who was the pillion rider of motor cycle, bearing Registration No.KL-5/1601, died as a result of the accident. Legal representatives of Ajay Gosh are the claimants.

2. The Tribunal found, on evidence, that the first respondent Roy was riding the motor cycle on the date of accident. The vehicle was owned by the second respondent before the Tribunal. The Tribunal also found that there was valid insurance policy. Issue No.5, namely, "who is liable to pay compensation to the petitioner" was answered by the

Tribunal holding that the first respondent is primarily liable, the second respondent is vicariously liable and the third respondent as insurer of the vehicle is liable to indemnify the insured, namely, the second respondent before the Tribunal. It was held that respondents 1 to 3 are jointly and severally liable to pay the compensation to the second respondent. The Tribunal found that the accident occurred on account of the rash and negligent driving of the motor cycle by the first respondent and he was permitted to drive the vehicle by the second respondent. The Tribunal found that the first respondent had no driving licence at the relevant time. However, it was also found that it is not enough if the insurance company proves that the driver had no valid driving licence but the insurer will have to further plead and prove that the insured had entrusted the vehicle to such person knowing that he had no driving licence. The

decisions in **Skandia Insurance Co. Ltd.** v. **Kokilaben Chandravadan and others** (AIR 1987 SC 1184); **United India Insurance Co. Ltd.** v. **Jameela Beevi** (1991 (1) KLT 832) and **Sohan Lal Passi** v. **P.Sesh Reddy and others** (AIR 1996 SC 2627) were relied on by the Tribunal.

3. The learned counsel for the appellant submitted that in view of the decision of the Supreme Court in **National Insurance Co. Ltd.** v. **Swaran Singh** (2004 (1) KLT 781 (SC)), the insured is liable to reimburse the appellant/insurer. The Supreme Court in Swaran Singh's case held thus:

> ".. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed

driver or one who was not disqualified to drive at the relevant time.

(iv) The insurance companies are, however, with a view to avoid their liability must not only establish the available defence(s) raised in the said proceedings but must also establish `breach' on the part of the owner of the vehicle, the burden of proof therefor would be on them.

(v) The court cannot lay down any criteria as to how said burden would be discharged, inasmuch as the same would depend upon the facts and circumstances of each case.

(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches of the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. ....

... .

(x) Where on adjudication of the claim under the Act the Tribunal arrives at a conclusion that the insurer has satisfactorily proved its defence in accordance with the provisions of S.149(2) read with sub-s.(7), as interpreted by this Court above, the Tribunal can direct that the insurer is liable to be reimbursed by the insured for the compensation and other amounts which it has been compelled to pay to the third

> party under the award of the Tribunal. Such determination of the claim by the Tribunal will be enforceable and the money found due to the insurer from the insured will be recoverable on a certificate issued by the Tribunal to the Collector in the same manner under S.174 of the Act as arrears of land revenue. ..."

In the light of the decision in Swaran Singh's case, I am of the view that the matter requires reconsideration by the Tribunal. The parties would be free to make necessary amendment to the pleadings and to adduce such other evidence as they wish to adduce. The Tribunal shall dispose of the matter expeditiously.

In the result, the Miscellaneous First Appeal is partly allowed and while confirming the award passed in favour of the claimants and confirming the liability of respondents 1 and 2 in the O.P. (MV), the award is set aside to the limited extent of giving an opportunity to the third respondent insurer to prove necessary facts to enable it to

claim recovery of the compensation from the insured as held in Swaran Singh's case. The Tribunal shall consider afresh the aforesaid question only and pass award in accordance with law. The parties shall appear before the Tribunal on 12th February, 2007.

(K.T.SANKARAN)
Judge

ahz/

K.T.SANKARAN, J.

M.F.A.NO. 24 OF 1998

JUDGMENT

12th January, 2007